129

(1)

Supreme Court, U.S.
FILED
MAY 20 2009
OFFICE OF THE CLERK

No. -081451

IN THE

Supreme Court of the United States

GERARD DARREN MATTHEW, JANISE MATTHEW, as mother and natural guardian of infant VICTORIA CLAUDETTE MATTHEW, HERBERT REED, COLETTE CALLENDER, RAYMOND RAMOS, PRINCESS RAMOS, HECTOR VEGA JR., LEOPOLDINA VEGA, AUGUSTIN MATOS JR., THERESA MATOS, ANTHONY YONNONE, ARLENE YONNONE, JERRY FERNANDO OJEDA, ANTHONY PHILLIP, YOLANDA PHILLIP,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY,

Defendant-Appellee.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

ELISE HAGOUEL LANGSAM, ESQ.
LANGSAM LAW
7 Dey Street, 5th Floor
New York, New York 10007
212-742-2700

and

GEORGE ZELMA, ESQ.
888 Seventh Avenue, 45th Floor
New York, New York 10106
212-247-4650

Attorneys for Plaintiffs-Appellants

May 20, 2009

QUESTIONS PRESENTED

1. Whether the medical malpractice claims of petitioners-servicemen arising from the improper treatment and concealment of their medical condition while in hospitals and treatment facilities inside and outside the United States prior to their discharge from active duty, and derivative claims, are barred by *Feres v. United States*, 340 U.S. 135 (1950) ("*Feres* doctrine").

2. Whether the separate and independent claim of infant-petitioner Victoria Matthew for injuries sustained *in utero* resulting from post-genesis lack of pre-natal care and treatment is barred by the *Feres* doctrine.

3. Whether the claims of petitioners-servicemen for exposure to radioactive depleted uranium ("DU"), and derivative claims, are barred by the *Feres* doctrine, where respondent violated its own rules and regulations regarding DU exposure and medical treatment standards and concealed the known hazards of radioactive DU contamination before exposure and throughout medical treatment.

4. Whether petitioners-servicemen's claims for exposure to radioactive DU and medical treatment rendered outside the United States, and derivative claims, are specifically sanctioned by 28 U.S.C. § 2674 and not excluded by 28 U.S.C. § 2680(j) and 28 U.S.C. § 2680(k).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
TABLE OF APPENDICES	iv
TABLE OF CITED AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS	2
STATEMENT OF THE CASE	3
Nature of the case	3
Statement of Relevant Facts	4
A. Civilians Called to Active Duty	4
B. Respondent's Knowledge And Concealment Of DU's Toxicity	6
C. Medical Malpractice	9
D. Claim of Infant-Petitioner Victoria Matthew	11
REASONS FOR GRANTING THE PETITION	12

Page

I. The Rationale Underlying *Feres* Should Not Bar Petitioners' Claims Which are Specifically Sanctioned by the Federal Tort Claims Act 14

II. The *Feres* Doctrine Does Not Apply To Petitioners-Servicemen's Medical Malpractice Claims 20

III. None Of The Considerations Underlying The *Feres* Doctrine Applies To The Claim Of The Infant Petitioner 23

IV. Petitioners-Servicemen's Claims For Exposure to Radioactive DU And Medical Treatment Rendered Outside The United States Are Specifically Sanctioned by 28 U.S.C. § 2674 And Do Not Fall Within The Exceptions Set Forth in 28 U.S.C. § 2680(j) and 28 U.S.C. § 2680(k) 27

A. 28 U.S.C. § 2680(j) 27

B. 28 U.S.C. § 2680(k) 29

CONCLUSION 30

TABLE OF APPENDICES

Page(s)

Appendix A—
Summary Order and Opinion of the United States Court of Appeals for the Second Circuit Decided February 20, 2009 ..... 1a

Appendix B—
Opinion and Order of the United States District Court for The Southern District of New York Dated September 26, 2006 ..... 10a

TABLE OF AUTHORITIES

Page(s)

Cases:

Broudy v. United States of America,
661 F.2d 125 (9th Cir. 1981)..... 19

Brown v. United States,
462 F.3d 609 (6th Cir. 2006)..... 19, 23

Del Rio v. United States,
883 F.2d 282 (11th Cir. 1987) 23, 26

Everett v. United States,
492 F. Supp. 318 (S.D. Ohio 1980) 19

Feres v. United States,
340 U.S. 135 (1950).....*passim*

Hayes v. U.S. Department of the Army,
44 F.3d 377, 381 (5th Cir. 1995) 19

Johnson v. United States,
170 F.2d 767 (9th Circ. 1948)..... 27, 28

Lombard v. United States,
690 F.2d 215 (D.C. Cir. 1982)....13, 17, 19, 23-26

McAllister v. United States of America,
942 F.2d 1473 (9th Cir. 1991) 18

Romero v. United States of America,
954 F.2d 223 (4th Cir. 1992)..... 23

Schonefeld v. Quamme,
492 F.3d 1016 (9th Cir. 2007) 17, 21

Schwartz v. United States,
230 F.Supp.536 (E.D. Pa. 1964)..... 19

Page(s)

Thornwell v. United States,
471 F. Supp. 344 (D.C.DC 1979) 19, 21, 22

United States v. Brown,
348 U.S. 110 (1954) 13, 20, 21

United States v. Johnson,
481 U.S.681 (1987) 14, 15, 18

United States v. Shearer,
473 U.S. 52 (1985)..... 19

United States v. Spelar,
338 U.S. 217 (1949)..... 29

Statutes:

28 U.S.C. § 1346(B) 3

28 U.S.C. § 1402(b) 3

28 U.S.C. § 2401(b) 3

28 U.S.C. § 2671-80 3

28 U.S.C. § 2674 .....i, 2, 12, 14, 27

28 U.S.C. § 2680 .....i, 2, 3, 12, 13

28 U.S.C. § 2680(j) .....i, 2, 3, 12, 13, 16, 27

28 U.S.C. § 2680(k) .....i, 2, 3, 12, 13, 27, 29

Petitioners respectfully petition for Writ of *Certiorari* to review the order of the United States Court of Appeals for the Second Circuit, which was decided and entered on February 20, 2009.

OPINIONS BELOW

The order of the United States Court of Appeals for the Second Circuit from which petitioners seek certiorari, was issued on February 20, 2009. The decision is reported at *Matthew v. United States of America,* 2009 WL 424181 (C.A.2 (N.Y.) and appears in the Appendix at p. 1a-9a.

The Court of Appeal's February 20, 2009 decision followed an appeal from an order of the United States District Court for the Southern District of New York (Koeltl, U.S.D.J.), dated September 26, 2006 and entered on September 27, 2006 which dismissed pre-discharge claims of petitioners. This opinion is reported at 452 F.Supp. 2d 433 (S.D.N.Y. 2006) and appears in the Appendix at p.10a-36a.

JURISDICTION

The Order of the Court of Appeals for the Second Circuit was entered on February 20, 2009. This Court has jurisdiction to review the judgment/ order of the Court of Appeals for the Second Circuit by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The statutory provisions at issue in this matter are 28 U.S.C. § 2674 (Federal Tort Claims Act), 28 U.S.C. § 2680(j) and 28 U.S.C. § 2680(k).

28 U.S.C. § 2674 states as follows:

> "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.
>
> If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.
>
> With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

> With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses tc which the Tennessee Valley Authority is entitled under this chapter."

28 U.S.C. § 2680(j) and 28 U.S.C. § 2680(k) state as follows:

> "The provisions of this chapter and section 1346(b) of this title shall not apply to—
>
> * * *
>
> (j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.
>
> (k) Any claim arising in a foreign country."

STATEMENT OF THE CASE

Nature of the Case

Petitioners, members of the Army Reserves, their wives, and an infant child, filed an action in the United States District Court for the Southern District of New York under the Federal Tort Claims Act, 28 U.S.C. Sections 1346(b), 1402(b), 2401 (b) and 2671-2680, alleging claims of negligence and

concealment causing petitioners-servicemen's exposure to radioactive DU while in Iraq in 2003, claims of medical malpractice and concealment on behalf of petitioners-servicemen for treatment inside and outside the United States, a claim of medical malpractice on behalf of the infant-petitioner and derivative claims on behalf of the spouses of petitioners-servicemen.

The District Court granted respondent's motion to dismiss those claims which arose prior to the servicemen's discharge, holding that the *Feres* doctrine barred petitioners' pre-discharge claims because they implicated scrutiny of military discipline and policies. The claims of the spouses and that of the infant were dismissed as derivative and therefore barred by *Feres*. The District Court also held that petitioners' claims for medical malpractice after discharge were not barred by *Feres*.[1]

The Court of Appeals for the Second Circuit affirmed the District Court's decision.

Statement of Relevant Facts

A. Civilians Called to Active Duty

Petitioners-servicemen were civilians employed in their communities and were reservists in the National Guard, when they answered the call to duty and were sent to Iraq in 2003. While perform-

[1] Although the District Court upheld petitioners' post-discharge medical malpractice and derivative claims, petitioners discontinued said claims to permit appeal from a final judgment to the Court of Appeals.

ing routine non-combat activities removing debris, the servicemen were exposed to highly toxic radioactive DU, known to the respondent to be present in the environment. Exposure occurred imperceptibly while petitioners-servicemen were breathing, eating and sleeping in the toxic atmosphere. The petitioners-servicemen's exposure to radioactive DU occurred after combat had ended, as declared by President Bush aboard the USS Abraham Lincoln on May 1, 2003.

DU is a heavy metal and radioactive poison. Its toxicity is not debatable. DU is used to make armor piercing munitions that fragment and burn when they strike their targets. DU is also used as "impenetrable" armor in tanks and other equipment. When DU shells meet DU plates the depleted uranium aerosolizes and becomes radioactive heavy dust.

As the uranium burns, it sends up smoke containing fine particles of uranium oxide aerosol. DU toxicity literally permeates the environment, including food, water, air and clothing. The inhalation of DU dust is the most likely route for uranium to enter the body and do serious damage, with the smallest, invisible DU dust particles doing the greatest damage. Consequently, one may not realize inhalation exposure has taken place. As these dust particles slowly dissolve in the lungs and uranium is absorbed into the blood, it gets distributed to all parts of the body. DU contaminated dust is breathed into the lungs and will remain there indefinitely, emitting constant low-level radiation.

It will continue to effect, by continuous flow of radiation, nearby healthy cell tissues. Just walking or rummaging around a DU destroyed vehicle long after the dust has settled can re-suspend the fine particles of DU, which may be inhaled, ingested and absorbed through the skin.

When constant low doses of uranium are absorbed as they would be from DU dust particles in the lungs, the uranium is distributed to bone, brain, liver, lymph, spleen, testes and other organs. Uranium dust causes permanent damage to the kidneys and the lungs, resulting in chronic respiratory problems. Uranium exposure also severely impacts neurological functions and causes mutations in DNA. Uranium exposure results in increased chromosomal aberrations. Mutations in the DNA of germ cells in the testes and ovaries may lead to birth defects or miscarriage.

B. Respondent's Knowledge And Concealment Of DU's Toxicity

The toxic effects of DU have long been known by respondent. The government had specific knowledge prior to petitioners'-servicemen's call-up and deployment to Iraq of the toxic properties of aerosolized dust consisting of fine-grained readily respirable particulants, containing very high concentrations of uranium oxides derived from the combustion of DU munitions. Respondent was aware that particles of DU adhere and deposit on all environmental surfaces: roadways, agricultural fields, vacant lots, open water, building surfaces,

clothing, exposed skin. Respondent knew that *in vivo*, small uranium oxide dust particles would exert chemically-mediated, radiological and heavy metal toxicity upon and within human beings who are exposed to the DU dust unprotected.

The Army knew of these dangers after the First Gulf War of 1991, as there had already been sufficient evidence of exposure and injuries to soldiers and the local population from DU, including a high number of birth defects.

Respondent was aware of these dangers and endorsed a policy of concealment. A 1991 report issued by the government known as the Los Alamos Memorandum conceded that "there has been and continues to be a concern regarding the impact of DU on the environment", but directed all military personnel to "write all reports regarding effects of DU such that they never reveal the serious adverse effects as a consequence of DU use."

Upon completion of the ground combat phase of the Gulf War in 1991, the government assigned Douglas Rockke, later appointed to be Director of the US Army Depleted Uranium Project, to clean up the DU contaminated U.S. equipment and provide initial medical recommendations for all individuals who would be exposed to DU.

Congress directed an inquiry to assess the risks associated with DU contamination and toxicity and how to address such risks. This inquiry resulted in a full report issued by the Army. The report included rules for the prevention of exposure and protec-

tion of all personnel by use of prophylactic gear; standards for immediate medical care; and medical protocols for DU exposure and toxicity.

During August 1993, General Erik Shinseki, U.S. Army of the United States Department of Defense issued a directive acknowledging the dangers of DU and required the Army to "provide adequate training for personnel who may come in contact with depleted uranium equipment" and "complete medical testing of personnel exposed to DU contamination during the Persian Gulf War".

Evidence of DU's toxicity continued to mount in the years prior to the 2003 war in Iraq. As a result, the government issued rules and regulations concerning the hazards of DU and the guidelines for reducing hazards of this dangerous substance. These government directives recognized the serious health hazards posed by DU. However, respondent continued to deny the "serious adverse effects and consequences of DU" exposure.

Exposure occurred while petitioners-servicemen were engaged in clean-up of debris while wearing t-shirts and slacks and eating and sleeping in radioactive toxic DU dust. Petitioners-servicemen were given no protective gear prior to their exposure.

The geographic area in which petitioners-servicemen were exposed to radioactive DU particles had been identified by the government and other coalition nations as an area of significant radioactivity with the presence of heavy lead particles. Dutch

troops identified high concentrations of radioactive DU and pulled all their personnel from the area, in order to protect them from the same known radioactive DU contamination that petitioners-servicemen were exposed to.

Respondent failed to comply with its own regulations, orders and directives that required: (i) use of protective equipment in the handling of DU; and (ii) prompt and effective medical care for all exposed individuals. Instead, the government concealed the risks of radioactive DU from petitioners-servicemen and failed to reveal the serious adverse effects of radioactive DU exposure. The government failed to provide petitioners-servicemen with any of the protections required in the Army's own directives.

C. Medical Malpractice

As a result of petitioners-servicemen's exposure to radioactive DU, each serviceman reported common and diverse medical symptoms associated with DU toxicity. Each serviceman suffered neurological and organic damage as a result of his exposure to radioactive DU. Petitioners-servicemen currently suffer from all or several of the following conditions and symptoms: kidney stones, blood in stool, blood in urine, burning upon urination, weight loss, chronic and severe headaches; migraine headaches, dizziness, blackouts, sensitivity to light, blurred vision, numbness; erectile dysfunction, skin rashes, sleep apnea, cognitive deficits, emotional disorders, tremors, neuropathy, severe itching, body and joint

aches, diarrhea, long and short term memory loss; abnormal growths; liver lesions; sexual dysfunction; shortness of breath; joint pain; skin disorders; sleeping disorders, sexual dysfunction, shortness of breath, joint pain, skin disorders and sleeping disorders.

After exposure each petitioner-serviceman was treated at an Army medical facility, first in Iraq, then in Germany, and then in the United States at Walter Reade, Fort Dix and other facilities. At all stages of medical treatment, respondent concealed the true nature of the petitioners-servicemen's conditions, symptoms and injuries. Respondent continued, as a matter of policy and for no apparent reason, to deny to petitioners-servicemen that they had been exposed to radioactive DU and that there were known adverse health effects from exposure to DU, including the risk of birth defects.

Respondent failed to comply with its own medical rules, which required prevention first, and that DU contamination must be diagnosed and treated within twenty four hours of exposure. The government doctors failed to properly diagnose petitioner-soldiers and instead misdiagnosed conditions, symptoms and injuries.

Upon petitioners-servicemen's return to the United States, respondent again concealed their true medical condition. Despite specific ongoing complaints of physical injuries and symptoms consistent with radioactive DU exposure, and repeated visits to Veteran Administrations' medical facilities, respondent concealed from each serviceman/

patient the true nature of his symptoms and injuries.

On American soil, the government doctors falsely informed the servicemen/patients that testing had revealed no DU contamination in their bodies and that their symptoms were likely the results of post traumatic stress syndrome (PTSD) or were psychosomatic. Urine and blood samples were repeatedly lost or misplaced and therefore no results of tests for DU were made known to petitioners-servicemen. Respondent's concealment and wrongful medical treatment continued beyond the petitioners-servicemen discharge from military service.

It was only when each petitioner-serviceman was independently tested through the efforts of a New York Daily News reporter that each man was found positive for DU toxicity and was, for the first time, informed of that fact.

D. Claim of Infant-Petitioner Victoria Matthew

The infant petitioner Victoria Matthew was conceived by Gerard Matthew and Janis Matthew in Sept/October 2003, after Gerard Matthew's return from Iraq. Infant petitioner Victoria Matthew has a separate and independent claim for injuries sustained *in utero* resulting from post-genesis lack of treatment. As a result of the respondent's concealment of the petitioner Gerard Matthew's DU toxicity, both petitioner Janis Matthew and the infant-petitioner Victoria Matthew were prevented from receiving proper pre-natal care and treatment,

resulting in Victoria's abnormal pre-natal development. Victoria was born on June 28, 2004, with a malformed and disfigured right hand, missing four and a half fingers. Such birth defects are similar to those suffered by many Iraqi children after the Gulf War and have been linked to DU toxicity.

REASONS FOR GRANTING THE PETITION

This petition raises a compelling question of vital importance to federal courts and military personnel and their families nationwide regarding the statutory interpretation of 28 U.S.C. § 2674 (Federal Tort Claims Act), 28 U.S.C. § 2680(j) and 28 U.S.C § 2680, and the viability of the *Feres* doctrine, particularly where the government violated its own rules and regulations regarding radioactive DU exposure and medical treatment standards. Respondent concealed the known hazards of radioactive DU contamination even prior to the servicemen's military service and continued to do so throughout medical treatment.

The Court of Appeals concluded that *Feres* applies to bar all claims of petitioners-servicemen and their spouses arising prior to the petitioners-servicemen's discharge, whether based upon negligence or medical malpractice, and barred the separate and independent claim of the infant petitioner Victoria Matthew for injuries sustained *in utero*, resulting from negligent pre-natal care and treatment rendered to her and her mother, petitioner Janis Matthew.

That determination should be reviewed by this Court for the following reasons:

(1) The Court of Appeal's dismissal of petitioners' medical malpractice claims is inconsistent with the rationale of this Court's refusal to apply *Feres* to post-discharge medical claims in *United States v. Brown*, 348 U.S. 110 (1954). Petitioners-servicemen's status as patients is the same pre-discharge and post-discharge, and does not present any issues of military discipline.

(2) The Court of Appeals decision conflicts with relevant decisions of the Court of Appeals for the Fourth, Sixth, and Ninth Circuits, permitting claims under *Feres*;

(3) The Court of Appeals decision barring the claim of infant Victoria Matthew under the *Feres* doctrine conflicts with relevant decisions of the Courts of Appeals for the Fourth, Sixth and Eleventh Circuits, and the dissent of Justice Ginsberg in *Lombard v. United States*, 690 F.2d 215, 228-233 (D.C. Cir. 1982);

(4) The Court of Appeal's decision misinterprets the clear language of the narrow statutory exceptions to the Federal Tort Claims Act set forth in 28 U.S.C. 2680(j) and 28 U.S.C. 2680(k), as petitioners-servicemen were non-combatants and no laws of a foreign power existed at any relevant time;

(5) *Feres* was wrongly decided fifty seven years ago and should not apply to the case at bar, in view of the widespread criticism that *Feres* has received from this Court in *United States v. Johnson*, 481 U.S. 681, 702 (1987) (Dissent, Justice Scalia, joined by Justices Brennan, Marshall and Stevens) and by Courts of Appeals' decisions in the Fourth, Sixth, Ninth and Eleventh Circuits.

I. The Rationale Underlying *Feres* Should Not Bar Petitioners' Claims Which are Specifically Sanctioned by the Federal Tort Claims Act

Petitioners' claims are specifically sanctioned by the FTCA, which provides that the United States shall be liable for tort claims "in the same manner and to the same extent as a private individual under like circumstances." 28 USC 2674. In discussing the Federal Tort Claims Act, the Supreme Court in *Feres v. United States*, *supra*, 340 U.S. at 156, recognized that the FTCA:

> "should be construed to provide a statutory system of remedies against the Government to make a workable, consistent and equitable whole. The Tort Claims Act was not an isolated and spontaneous flash of Congressional generosity. It marks the culmination of a long effort to mitigate unjust consequences of sovereign immunity from suit. . . As the federal government expanded its activities its agents caused a multiplying number of

> remediless wrongs—wrongs which would have been actionable if inflicted by an individual or a corporation but remediless solely because their perpetrator was an officer or employee of the government.

Despite this waiver of sovereign immunity, the Court in *Feres* carved out a judicial exception to this legislation, to protect the government from tort liability derived from military decisions. The *Feres* Court created the doctrine despite its recognition that the legislative history of FTCA may have indicated a different intent by Congress.

> "the fact that eighteen tort claims bills were introduced in Congress between 1925 and 1935 and all but two expressly denied recovery to members of the armed forces, but the bill enacted as the present Tort Claims Act from its introduction made no exception." *Id* at 140.

No less than five Justices of this Court have strongly criticized *Feres*, as well as federal Courts throughout the country. In *United States v. Johnson*, *supra*, 481 U.S at 702, Judge Scalia, joined by Justices Brennan, Marshall and Stevens, dissenting, stated:

> "It is strange that Congress' 'obvious' intention to preclude *Feres* suits because of their effect on military discipline was discerned neither by the *Feres* Court not by the Congress that enacted the FTCA (which felt it

necessary expressly to exclude recovery for combat injuries). Perhaps Congress recognized that the likely effect of *Feres* suits upon military discipline is not as clear as we have assumed, but in fact has long been disputed. . . Or perhaps Congress assumed that the FTCA's explicit exclusions would bar those suits most threatening to military discipline, such as claims based upon combat command decisions, 28 U.S.C. Section 2680(j). . . . Or perhaps-most fascinating of all to contemplate- Congress thought that barring recovery by servicemen might adversely affect military discipline. *Id* at 699-700

* * *

"*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received. *In re "agent Orange" Product Liability suit*, and cases cited therein. . . . . [r]ationales—the only ones actually relied upon in *Feres*—are so frail that it is hardly surprising that we have repeatedly cited the later-conceived-of "military discipline' rationale as the 'best ' explanation for that decision. (citations omitted) . . . ." *Id* at 701

* * *

"I would not extend *Feres* any further. I confess that the line between FTCA suits alleging military negligence and those alleging

> civilian negligence has nothing to recommend it except that it would limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred."

Justice Ginsberg also criticized *Feres* in *Lombard v. United States*, *supra*, 690 F.2d at 229 -232:

> "The *Feres* doctrine does not inexorably bar a veterans' FTCA claim merely because the claim is linked with an in-service injury. . . . members of a soldier's family have recovered under the FTCA for personal injuries they have sustained . . . where the injuries arose from non-combatant activities. . . . claims require a more searching analysis than the government proposed in order to determine whether, or how deeply, those claims implicate the concerns that gave rise to the *Feres* doctrine."

Most recently, in *Schonefeld v. Quamme*, 492 F.3d 1016, 1020 (9th Cir. 2007) the Court stated:

> "Despite this framework, our *Feres* jurisprudence is something of a muddle. '[W]e have reached the unhappy conclusion that the cases applying the *Feres* doctrine are irreconcilable, and thus, comparison of fact patterns to outcomes in cases that have applied the *Feres* doctrine is the most appropriate way to resolve *Feres* doctrine cases.'"

As recognized in *McAllister v. United States of America*, 942 F.2d 1473, 1475-1476 (9th Cir. 1991):

> "The *Feres* doctrine, as the rule of these three cases has come to be known, is highly controversial. It has been criticized 'by countless courts and commentators,' including this Court. *Persons*, 925 F.2d at 295. Some have found fault with the Court's creation of a judicial exception to a clear statutory pronouncement and the unfairness that the rule has often produced. *See, e.g., United States v. Johnson, 481 U.S. 681 (1987) (Scalia, J., dissenting and joined by Brennan, Marshall and Stevens.* . . (urging Court to 'limit our clearly wrong decision in *Feres* and confine the unfairness and irrationality that decision has bred.') (citations omitted). . . Others have found fault with the essential vagueness and ambiguity of the doctrine itself. *See, eg., Millang v. United States*, 817 F.2d 533, 535 (9th Cir. 1987) (*per curiam*) (noting the 'somewhat elusive "incident to service" standard') *cert den.*, 485 U.S. 987 (1988); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir.1981) . . . *cert den* 456 U.S. 989 (1982) (citing *Millang* and *Monaco* and noting that 'it is entirely unclear which of the doctrine's original justifications survive'). A comparison of reasoning with outcomes in cases that have applied the doctrine validates these concerns: the results have not flowed easily from the doctrines purported rationales."

In *Hayes v. United States Department of the Army*, 44 F.3d 377, 381 (5th Cir. 1995), the Court of Appeals for the Fifth Circuit, relying on *United States v. Shearer*, 473 U.S. 52, 57 (1985), held that the application of *Feres* must be evaluated on a case-by-case basis.

> "[T]he Supreme Court reaffirmed the *Feres* doctrine but instructed courts to take a case-by-case, rather than *per se* approach to claims for immunity: the *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of the statute as it has been construed in *Feres* and subsequent cases."

Our Courts have long recognized situations wherein active duty servicemen have sustained injuries, which were not barred by *Feres*. *See Brown v. United States, supra*; *Broudy v. United States of America*, 661 F.2d 125 (9th Cir. 1981); *Everett v. United States*, 492 F. Supp. 318 (S.D. Ohio 1980); *Thornwell v. United States*, 471 F. Supp. 344 (D.C.DC 1979); *Schwartz v. United States*, 230 F.Supp.536 (E.D. Pa. 1964.) *See also Lombard v. United States*, *supra* 690 F.2d at 229 (Justice Ginsberg dissenting).

What interest does the *Feres* doctrine protect? What interest is served when the government undermines its own citizens and then shields itself by claiming immunity under judicial doctrine? No judicial doctrine should be interpreted to immunize the government from deliberately exposing its own citizens to a known poison for no strategic reason.

This Court should not follow a judicial doctrine from a different era that would condone, without recourse, concealment of radioactive DU exposure and medical mistreatment, resulting in injuries to servicemen, their wives and their children.

II. The *Feres* Doctrine Does Not Apply To Petitioners-Servicemen's Medical Malpractice Claims

This Court has upheld claims of medical malpractice after discharge from service, finding that the injury for which suit was brought was not incurred while the claimant was "subject to military service". *United States v. Brown*, *supra*, 348 U.S. at 112. It is no more incident to military service that petitioners were patients before discharge than after discharge. The District Court did not dismiss the post-discharge medical malpractice claims. There is no meaningful distinction between petitioners' status before or after discharge: they were medical patients at all relevant times. As patients, their status is much more akin to civilians relying on a physician's treatment and decision-making, and therefore their medical malpractice claims do not invoke the military discipline rationale of *Feres*.

As medical patients prior to discharge seeking treatment, petitioners-servicemen are indistinguishable from civilians victimized by medical malpractice. As medical patients, they were "not subject in any real way to the compulsion of military orders or performing any sort of military mis-

sion . . . [They] could just as easily have been injured [by medical malpractice] had [they] never worn a uniform at all." *Schonefeld, supra,* 492 F3d at 1021, quoting *United States v. Brown, supra,* 348 U.S. at 114.

A claim for medical malpractice also does "not involve the sort of close military judgment calls that the *Feres* doctrine was designed to insulate from judicial review." *Schonefeld, supra,* 492 F3d at 1021.

These principles were expressed in *Thornwell v. United States, supra,* 471 F.Supp at 351, which relied upon this Court's decision in *United States v. Brown, supra,* holding that claims for medical malpractice post-discharge were actionable and consistent with the rationale of *Feres*:

> "In reviewing the personal injury claims of servicemen, courts have recognized that the precise relationship at the time of the wrong between the plaintiff and the military is a critical factor. (citations omitted). If the plaintiff is a civilian when the alleged negligence occurs, immunity serves no valid purpose. With civilian status, the "peculiar and special relationship of the soldier to his superiors, *United States v. Brown*, 348 U.S, at 112, ceases and, as a result, the maintenance of a lawsuit will not have a deleterious effect on military discipline. Moreover, another factor critical to *Feres*—the "distinctively federal relationship" between the government and

> the members of its Armed Forces, 340 U.S. at 143—is completely vitiated by an individual's change to civilian status: for civilians, there is no longer any relationship to be protected."

Although *Thornwell* dealt with post-discharge medical malpractice claims, the facts presented at bar satisfy the reasoning of that decision and should apply equally to pre-discharge claims. Petitioners-servicemen were, for all intents and purposes, civilians when they became medical patients and no longer had a "special relationship of the soldier to his superiors". Petitioners-servicemen were no longer part of a "distinctively federal relationship with the government," but rather patients suffering from severe ailments who were entitled to truthful and appropriate medical care. The special privileges involved in a doctor-patient relationship were violated by the government doctors' concealment of appellants' true medical condition.

The rationale of *Feres* that soldiers would be compensated in another forum is also not applicable, as the government's concealment of petitioners-servicemen's DU toxicity has effectively prevented them from making disability claims for DU toxicity.

III. None Of The Considerations Underlying The *Feres* Doctrine Applies To The Claim Of The Infant Petitioner

The claim of infant-petitioner Victoria Matthew constitutes a separate and independent claim for injuries sustained *in utero* resulting from post-genesis lack of treatment, and thus is not barred by *Feres*. As a result of the respondent's concealment of the petitioner Gerard Matthew's DU toxicity, both petitioner Janis Matthew and the infant-petitioner Victoria Matthew were prevented from receiving proper pre-natal care and treatment, resulting in Victoria's abnormal pre-natal development. The *Feres* doctrine's rationale is not applicable, as no distinctively federal relationship with the government exists between the infant plaintiff and the government, as military discipline is not implicated and statutory compensation benefits are not available to the infant. Claims for infants have been upheld by the Court of Appeals for the Sixth Circuit in *Brown v. United States of America*, 462 F.3d 609 (6th Cir. 2006), the Court of Appeals for the Fourth Circuit in *Romero v. United States of America*, 954 F.2d 223 (4th Cir. 1992), and the Court of Appeals for the Eleventh Circuit in *Del Rio v. United States*, 883 F.2d 282 (11th Cir. 1987) and addressed by Justice Ginsberg's dissent in *Lombard v. United States*, 690 F.2d 215, 228-233 (D.C. Cir. 1982).

In *Romero v. United States of America*, *supra*, 954 F.2d at 226 the Court of Appeals for the Fourth Circuit held:

"Moreover, application of the three *Feres* factors supports our conclusion that Joshua's claim is not barred. First, the relationship between Joshua, a civilian dependent, and the government is not distinctly federal. Although civilian dependents of service members are subject to some military rules and privy to some military privileges, their relationship to the military does not present the same tension between application of state and federal laws as is present with military persons. Second, as a civilian, Joshua has no other form of military compensation for his injuries. Finally, it is not likely that a suit alleging military medical negligence inflicted on a civilian child will impair the discipline necessary for effective service. This suit will not require the court to second-guess a decision of the military necessary to the accomplishment of a military mission. (citing *United States v. Johnson*, 481 U.S. 681, 689, 107 S.Ct. 2063, 2068, 95 L.Ed.2d 648 (1987)".

Justice Ginsberg dissenting in *Lombard v. United States*, *supra*, 690 F.2d at 228-233, refused to apply *Feres* to bar claims of children, where the Government had failed to warn their serviceman father of the dangers of radioactive materials, stating:

"In my view the *Feres* doctrine does not blanket the FTC claims stated by Theodore Lom-

bard, his wife and children. I therefore believe the District Court erred in dismissing those claims at the threshold for lack of subject matter jurisdiction on the basis of *Feres*. . . . Construed most favorably to the Lombards, their FTCA claims are as follows: Theodore Lombard regularly handled substantial quantities of radioactive materials during his two year Army service at the Los Alamos National Laboratory in connection with the Manhattan Project. The government deliberately exposed him to these dangerous materials but failed to provide him with any form of physical protection and did not effectively monitor his exposure to radiation. Further, the United States negligently failed to warn him at any time of the health hazards associated with radiation exposure. Theodore Lombard incurred permanent damage to his germ plasma as a direct result of his exposure to radiation at Los Alamos. Not knowing this fact, he fathered four children, all of who suffer moderate to severe congenital defects as a direct consequence of his chromosomal injuries."

* * *

". . . [E]ven if one accepts the government's position concerning the 'continuing' nature of the alleged wrong to Theodore Lombard, that the family members' claims require a more searching analysis than the government proposed in order to determine whether, or how

> deeply, those claims implicate the concerns that gave rise to the *Feres* doctrine. . . . While the question is not free from doubt, I do not believe the risk to military discipline posed by the FTCA claims of Ruth Lombard and the Lombard children is sufficiently grave to bring those claims within the reach of a reasonably delineated *Feres* doctrine."

Similarly, in *Del Rio v. United States*, 883 F.2d 282 (11th Cir. 1987), the Court permitted claims by an active duty servicewoman under the FTCA on behalf of her brain damaged child resulting from negligent prenatal care. The Court held that the injured child's claims were not barred by *Feres*, as the three *Feres* rationales were not present. The Court held that the negligent administration of prenatal care would not necessarily impair the "esprit de corps" necessary for effective military service, nor would it require the court to second-guess decisions by military personnel unique to the accomplishment of a military mission.

Respondent's concealment of her father's DU toxicity prevented the infant petitioner from receiving proper pre-natal care. Her claim should not be barred by *Feres*.

IV. Petitioners-Servicemen's Claims For Exposure to Radioactive DU And Medical Treatment Rendered Outside The United States Are Specifically Sanctioned by 28 U.S.C. § 2674 And Do Not Fall Within The Exceptions Set Forth in 28 U.S.C. § 2680(j) and 28 U.S.C. § 2680(k)

A. 28 U.S.C. 2680(j)

Congress has excepted from the FTCA, claims "arising out of combatant activities of the military . . . during time of war," 28 U.S.C.§ 2680(j). Here, petitioners-servicemen's claims and injuries arose from non-combatant activities after combat had ended. In an FTCA case decided just before *Feres*, *Johnson v. United States,* 170 F.2d 767, 770 (9th Circ. 1948), this Court discussed "non-combatant" status:

> "We cannot agree that the act of dumping noxious matter into the waters of a peaceful American harbor under the conditions here shown to exist must be held to have arisen out of combatant activities of these war vessels. 'Combat' connotes physical violence; 'combatant," its derivative, as used here, connotes pertaining to actual hostilities; the phrase 'combatant activities' of somewhat wider scope and super imposed upon the purpose of the statute, would therefore include not only physical violence, but activities both necessary to and in direct connection to actual hostilities. The act of supplying ammuni-

> tion to fighting vessels in a combat area during war is undoubtedly a "combatant activity" but this fact does not make necessary a conclusion that all varied activities having an incidental relation to some activity directly connected with previously ended fighting on active war fronts must, under the terms of the Act, be regarded as held to be a combatant activity.' To so hold might lead to results which need not here be considered. The rational test would seem to lie in the degree of connectivity. Aiding others to swing the sword of battle is certainly a 'combatant activity', but the act of returning it to a place of safekeeping after all of the fighting is over cannot logically be catalogued as a 'combat activity'. We conclude that the acts here complained of were not 'combat activities' within the meaning of Section 943(j), *supra*"

In the instant case, as in *Johnson*, *supra*, petitioners-servicemen were not engaged in "combatant activities". In *Johnson*, the defendant's military ship was awaiting assignment to return live ammunition which had not been used. Here, after the fighting was over, petitioners-servicemen were not even "returning the sword of battle" but merely removing debris in the middle of highly toxic radioactive DU dust. As in *Johnson*, this "cannot logically be catalogued as a 'combat activity'".

At the time of petitioners-servicemen's exposure to radioactive DU, combat operations had "ended".

The government, by its Chief Executive and Commander In Chief, declared aboard the USS Abraham Lincoln on May 1, 2003: "Major combat operations in Iraq have ended. In the battle of Iraq, the United States and our allies have prevailed. And now our coalition is engaged in securing and reconstructing the country. . ."[2]

B. 28 U.S.C. 2680(k)

The legislative intent underlying the FTCA's exception for tort claims arising in foreign countries, i.e., the unwillingness "to subject the United States to liabilities depending upon the laws of a foreign power" is simply not present in the instant case. "By the exclusion of 'claims arising in a foreign country,' the coverage of the Federal Tort Claims Act was geared to the sovereignty of the United States." *See, United States v. Spelar,* 338 U.S. 217, 221 (1949) (citing Hearings before House Committee on the Judiciary on H.R. 5373 and H.R. 6463, 77th Cong., 2d Sess 35 (1942). Clearly, with respect to petitioners-servicemen's exposure to radioactive DU and their medical treatment outside the United States, there were no foreign nations' laws to consider as the Iraqi government was toppled and that country was "reconstructing" under coalition control with no laws in effect.

In conclusion, petitioners respectfully request that this Court grant certiorari to address the question of whether *Feres* bars the claims of peti-

---

[2] Petitioners-servicemen asked the District Court to take judicial notice of the President's speech aboard the USS Abraham Lincoln on May 1, 2003.

tioners-servicemen for their exposure to radioactive DU, the medical malpractice claims of petitioners-servicemen both outside and inside the United States, the claim of the infant-petitioner Victoria Matthew for injuries sustained *in utero* and derivative claims on behalf of the spouses of petitioners-servicemen.

CONCLUSION

For the reasons set forth, petitioners respectfully ask this Court to grant their petition for a writ of certiorari.

Respectfully submitted,

ELISE HAGOUEL LANGSAM, ESQ.
LANGSAM LAW, LLP
7 Dey Street, 5th Floor
New York, New York 10007
212-742-2700

and

GEORGE ZELMA, ESQ.
888 Seventh Avenue, 45th Floor
New York, New York 10106
212-247-4650

Counsel for Petitioners

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT HTTP://WWW.CA2.USCOURTS.GOV/). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 20th day of February, two thousand nine.

PRESENT: HONORABLE RALPH K. WINTER,
HONORABLE REENA RAGGI,
HONORABLE PETER W. HALL,
Circuit Judges.

07-4860-cv

GERARD DARREN MATTHEW, JANISE MATTHEW, as mother and natural guardian of infant VICTORIA CLAUDETTE MATTHEW, HERBERT REED, COLETTE CALLENDER, RAYMOND RAMOS, PRINCESS RAMOS, HECTOR VEGA JR., LEOPOLDINA VEGA, AUGUSTIN MATOS JR., THERESA MATOS, ANTHONY YONNONE, ARLENE YONNONE, JERRY FERNANDO OJEDA, ANTHONY PHILLIP, YOLANDA PHILLIP,

Plaintiffs-Appellants,

v.

UNITED STATES OF AMERICA, DEPARTMENT OF THE ARMY,

Defendant-Appellee.

APPEARING FOR APPELLANTS:

GEORGE P. ZELMA (Elise Hagouel Langsam, *on the brief*), New York, New York.

APPEARING FOR APPELLEE:

PETER M. SKINNER, Assistant United States Attorney, (Ross E. Morrison, Assistant United States Attorney, *on the brief*) *for* Lev Dassin, Acting United States Attorney for the Southern District of New York.

Appeal from the United States District Court for the Southern District of New York (John G. Koeltl, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on October 4, 2007, is AFFIRMED.

Plaintiffs, members of the Army Reserves ("soldier-plaintiffs") and their families ("family-plaintiffs"), appeal the dismissal of their claims brought pursuant to the Federal Tort Claims Act ("FTCA") and relating to the soldier-plaintiffs' alleged exposure to depleted uranium ("DU") while stationed in Iraq in 2003. We assume the parties' familiarity with the facts and the record of prior proceedings, which we reference only as necessary to explain our decision.

Where, as here, a district court grants a defendant's Rule 12(b)(1) motion to dismiss for lack of

subject matter jurisdiction, we review the district court's legal conclusions *de novo*, and must accept as true all material factual allegations in the complaint. *See Triestman v. Federal Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006). In applying this standard, we remain mindful that "'[t]he party invoking federal jurisdiction bears the burden of establishing' that jurisdiction exists." *Sharkey v. Quarantillo*, 541 F.3d 75, 82-83 (2d Cir. 2008) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

In this case, the *Feres* doctrine precludes plaintiffs from carrying their jurisdictional burden. In *Feres v. United States*, 340 U.S. 135 (1950), a unanimous Supreme Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Id.* at 146. While the *Feres* doctrine has been criticized, the Supreme Court has not retreated from its holding, nor has Congress statutorily circumscribed its reach. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 194, 199 (2d Cir. 1987); *see generally Dibble v. Fenimore*, 545 F.3d 208, 214-15 (2d Cir. 2008) (discussing *Feres* doctrine and noting that "subsequent judicial decisions have significantly expanded the intramilitary immunity doctrine" to bar *Bivens* and 42 U.S.C. § 1983 actions); *Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d 83, 89-91 (2d Cir. 2004) (discussing rationales underlying *Feres* doctrine and its "incident to service" test). We find no

error in the district court's thoughtful, well-reasoned application of *Feres* to the instant action.

1. The Exposure and Disclosure Claims

To the extent the soldier-plaintiffs seek to recover for injuries sustained as a result of their exposure to depleted uranium ("DU") while "perform[ing] active duty in Iraq," Cplt. ¶¶ 18, 21, 24, 27, 30, 33, 36, 39, such claims are plainly barred under *Feres*. *See generally In re Agent Orange Product Liability Litig.*, 818 F.2d at 200 ("If the *Feres* doctrine is to have any meaning at all, the claim for in-service injuries is a classic case for its application."). The decision to deploy plaintiffs to areas allegedly contaminated by DU, as well as defendant's subsidiary decisions regarding (1) what disclosures to make (or not make) to the soldier-plaintiffs regarding the dangers of DU exposure and (2) what steps to take (or not take) to protect them from such dangers, are simply not proper subjects for an FTCA action. *See Overton v. N.Y. State Div. of Military & Naval Affairs*, 373 F.3d at 89-90 ("The Supreme Court has observed that the *Feres* doctrine is designed in large measure to prevent civilian courts from interfering with military discipline and decision-making." (citing *United States v. Muniz*, 374 U.S. 150, 162 (1963))). Moreover, to the extent the soldier-plaintiffs seek to salvage these exposure and disclosure claims by maintaining that defendant's "policy of concealment" regarding the dangers of DU was put in place prior to their induction into the Army Reserve, Appellants' Br. at 18, we have held that such "pre-induction" concealment claims

are likewise barred under *Feres*. *See In re Agent Orange Product Liability Litig.*, 818 F.2d at 200 ("The recovery which the veterans seek for pre-induction negligence is dependent upon and inseparably intertwined with the injuries they allegedly sustained while in service. In a situation such as this, overwhelming authority holds that *Feres* bars recovery.").

2. The Malpractice Claims

The soldier-plaintiffs' malpractice claims for medical care they received at military facilities prior to their discharge are likewise barred by *Feres*.[1] As the district court noted, *Feres* itself concerned, in part, medical malpractice claims by active-duty service members regarding care received at military facilities, *see* 340 U.S. at 137, and numerous courts have held that such claims are encompassed by the *Feres* doctrine. *See Matthew v. United States*, 452 F. Supp. 2d 433, 439 (S.D.N.Y. 2006) (citing cases). Plaintiffs cite no

[1] The district court held that the soldier-plaintiffs could maintain medical malpractice claims under the FTCA insofar as such claims related to (1) alleged failures to render appropriate medical treatment or departures from accepted medical practices (2) that took place in the United States after they were discharged from military service. *Matthew v. United States*, 452 F. Supp. 2d 433, 441, 444-45 (S.D.N.Y. 2006). In addition, to the extent the family-plaintiffs' claims derived from such claims, the district court further held that those claims could proceed. *Id.* at 444. The parties subsequently executed a stipulation dismissing these surviving claims with prejudice in order to obtain a final judgment appropriate for appeal. These claims are therefore not at issue here.

cases supporting a narrowing construction of *Feres* on the facts of this case.[2]

3. The Derivative Claims

The family-plaintiffs' claims are brought (1) on behalf of Victoria Claudette Matthew, the daughter of plaintiffs Gerard Barren Matthew and Janise Matthew, for injuries sustained as a result of her exposure to DU "at conception and thereafter"; (2) by Janise Matthew for loss of companionship and medical expenses arising out of her daughter's exposure; and (3) by the wives of the soldier-plaintiffs for loss of "services, society and companionship" as a result of their husbands' exposure. Because these claims derive solely from the soldier-plaintiffs' alleged exposure to DU,[3] we agree with the district court that adjudicating such claims would require a court to examine the same ques-

---

[2] For example, plaintiffs rely heavily on the Ninth Circuit's decision in *Schoenfeld v. Quamme*, 492 F.3d 1016 (9th Cir. 2007), in which the court held that *Feres* did not bar an FTCA claim by an active-duty service member who, while "on liberty," was in a vehicle that crashed into a guardrail at Camp Pendleton that the government had allegedly failed to repair following an earlier accident. *Id.* at 1017-18 1026. We need not here decide whether we agree that the *Feres* doctrine does not apply in such circumstances. The claim at issue here—medical malpractice relating to plaintiffs' exposure to DU while deployed in Iraq—is easily distinguishable from the claim at issue in *Schoenfeld* in plainly arising out of or in the course of activities incident to service.

[3] It is not alleged that the family-plaintiffs were directly exposed to DU, but rather that the soldier-plaintiffs' exposure caused the further harms for which the family-plaintiffs seek recovery.

tions and decisions implicated by the soldier-plaintiffs' own FTCA claims, and that these claims, therefore, are similarly barred under *Feres*. *See In re Agent Orange Product Liability Litig.*, 818 F.2d 201, 203 (2d Cir. 1987) ("'There has been no suggestion in the legislative history of the Act that Congress was aware that the Tort Claims Act might be interpreted in such an anomalous manner that a serviceman-husband performing his military duty would be denied recovery against the Government whose employee's negligence may have caused him serious injury, while his spouse is allowed recovery as a consequence of the same set of facts.'" (quoting *Harrison v. United States*, 479 F. Supp. 529, 535 (D. Conn. 1979), *aff'd*, 622 F.2d 573 (2d Cir.))). *See generally Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 673 (1977) ("[I]t seems quite clear that where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party."); *Lombard v. United States*, 690 F.2d 215, 223 (D.C. Cir. 1982) (noting application of *Feres* to bar derivative claims of genetic defects by children whose serviceman fathers were exposed to mutating agents).[4]

[4] Again, the cases cited by plaintiff to avoid this result are not apposite. *Brown v. United States*, 462 F.3d 609 (6th Cir. 2006), specifically noted that courts have "distinguished claims involving injury to a child that derives from an injury to a service-member parent, such as a birth defect caused by a parent's exposure to radiation, from those claims for negligent medical care administered solely to the detriment of a

In reaching these conclusions, we express no view on the merits of plaintiffs' claims that their injuries derive—directly or indirectly—from their exposure to DU. We hold only that the FTCA does not provide a vehicle for the vindication of such claims. Accordingly, the judgment of the district court is AFFIRMED.

For the Court:
CATHERINE O'HAGAN WOLFE, Clerk of Court

By: _____

---

civilian child," *id.* at 614 (internal citation omitted), in holding that *Feres* did not bar an FTCA claim on behalf of a servicemember's infant daughter alleging negligent prenatal care. *See also id.* ("Doubtless, we would be obliged . . . to apply the *Feres* doctrine to bar the plaintiff's claim on his daughter's behalf had the injury to the child been caused by an injury to her mother, who was on active duty with the military at the time of the alleged negligence.").

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---

05 Civ. 8045 (JGK)

GERARD DARREN MATTHEW, JANISE MATTHEW, as mother and natural guardian of infant VICTORIA CLAUDETTE MATTHEW, HERBERT REED, COLETTE CALLENDER, RAYMOND RAMOS, PRINCESS RAMOS, HECTOR VEGA, JR., LEOPOLDINA VEGA, AUGUSTIN MATOS, JR., THERESA MATOS, ANTHONY YONNONE, ARLENE YONNONE, JERRY FERNANDO OJEDA, ANTHONY PHILLIP and YOLANDA PHILLIP,

Plaintiffs,

—against—

UNITED STATES OF AMERICA and DEPARTMENT OF THE ARMY,

Defendants.

OPINION AND ORDER

JOHN G. KOELTL, District Judge:

The plaintiffs, members of the Army Reserves and members of their families, bring this action under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 1402(b), 2401(b), and 2671-80, alleging that the soldier-plaintiffs suffered injuries as a

result of exposure to radioactive depleted uranium ("DU") while serving on active military duty in Iraq.

The plaintiffs assert six claims for relief in their Complaint. The first claim, asserted by the soldier-plaintiffs, alleges that those plaintiffs suffered injuries as a result of the negligence of the Department of the Army (the "Army"). (Compl. ¶¶ 69-86.) The second claim alleges medical malpractice by Army physicians in connection with treatment rendered prior to the soldier-plaintiffs' discharge from military service. The soldier-plaintiffs received medical treatment at medical facilities operated by the Army both overseas and in the United States. (Compl. ¶¶ 87-95.) The third claim alleges medical malpractice by Army physicians in connection with treatment rendered after the soldier-plaintiffs' discharge from military service. (Compl. ¶¶ 96-102.) The fourth claim alleges that the plaintiff Victoria Claudette Matthew, the daughter of plaintiffs Gerard Darren Matthew and Janise Matthew, was born on June 28, 2004 with "serious and permanent physical and psychological injuries" resulting from negligent exposure to DU upon conception and thereafter. (Compl. ¶¶ 103-07.) The fifth claim alleges that, as a result of the defendants' negligence, the plaintiff Janise Matthew has been deprived of the services and companionship of her daughter Victoria Claudette Matthew and has incurred medical expenses relating to Victoria Matthew's exposure to DU. (Compl. ¶¶ 108-11.) The sixth claim alleges that the spouse of each of the soldier-plaintiffs except Jerry Fernando Ojeda

has been deprived of the services, society, and companionship of her spouse as a result of the soldier-plaintiffs' exposure to DU. (Compl. ¶¶ 112-26.)

The defendants, the United States of America and the Department of the Army, move pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure to dismiss the Complaint on the ground that the Court lacks subject matter jurisdiction over each of the plaintiffs' claims under the doctrine of *Feres v. United States*, 340 U.S. 135 (1950), or under 28 U.S.C. §§ 2680(j) and 2680(k). In the alternative, the Government moves for dismissal of the plaintiffs' medical malpractice claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. For the reasons explained below, the defendants' motion is **granted in part and denied in part**.

I.

On a motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, the Court must accept the factual allegations contained in the complaint as true. *See Shipping Fin. Servs. Corp. v. Drakos*, 140 F.3d 129, 131 (2d Cir. 1998). The Court is not limited to considering the complaint alone, however, but may also consider matters outside the pleadings such as affidavits, documents, and testimony. *See Phifer v. City of New York*, 289 F.3d 49, 55 (2d Cir. 2002); *Antares Aircraft v. Fed. Republic of Nigeria*, 948 F.2d 90, 96 (2d Cir. 1991), *aff'd on*

remand, 999 F.2d 33 (2d Cir. 1993); *Kamen v. Am. Tel. & Tel. Co.*, 791 F.2d 1006, 1011 (2d Cir. 1986); *John Street Leasehold, LLC v. Capital Mgmt. Res., L.P.*, 154 F. Supp. 2d 527, 533-34 (S.D.N.Y. 2001), *aff'd*, 283 F.3d 73 (2d Cir. 2002). The standard used to evaluate a Rule 12(b)(1) motion is thus similar to that used for summary judgment under Rule 56. *See Kamen*, 791 F.2d at 1011.

The plaintiffs have the ultimate burden of proving the Court's jurisdiction by a preponderance of the evidence. *See Malik v. Meissner*, 82 F.3d 560, 562 (2d Cir. 1996); *Beacon Enters., Inc. v. Menzies*, 715 F.2d 757, 762 (2d Cir. 1983); *Fier v. United States*, No. 01 Civ. 2225, 2002 WL 453177, at *1 (S.D.N.Y. Mar 25, 2002), *aff'd*, 53 Fed. Appx. 158 (2d Cir. 2002); *see also Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir. 1991) (when subject matter jurisdiction is challenged under Rule 12, plaintiff bears the burden of persuasion); *Martin v. Reno*, No. 96 Civ. 7646, 1999 WL 527932 (S.D.N.Y. July 22, 1999); *Harp v. City of New York*, 218 F. Supp. 2d 495, 496-97 (S.D.N.Y. 2002).

II.

It is beyond dispute that sovereign immunity deprives a federal court of jurisdiction over claims against the United States Government except to the extent that sovereign immunity has been waived. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983). While the Government has, through the Federal Tort Claims Act, waived its sovereign immunity for a significant number of claims, that

waiver is not absolute and federal courts are without jurisdiction to hear claims for which the Government has not consented to suit.

In one of the earliest decisions interpreting the Federal Tort Claims Act, the Supreme Court held that active service members may assert claims against the Government for injuries unrelated to their military service. *Brooks v. United States*, 337 U.S. 49, 51-52 (1949). The Court therefore allowed a suit to proceed on behalf of a soldier and the estate of his brother, also a soldier, arising out of a collision between their vehicle and a vehicle driven by an Army employee. *Id.* at 50, 53. In so holding, the Court noted that the injuries were not incident to the soldiers' service. *Id.* at 50, 52.

Just one year later, however, the Supreme Court unanimously held in *Feres v. United States*, 340 U.S. 135 (1950), that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*, 340 U.S. at 146. The *Feres* doctrine has been reaffirmed on numerous occasions. *See, e.g., United States v. Johnson*, 481 U.S. 681, 686-88 (1987).

The Court of Appeals for the Second Circuit, like a number of other courts of appeals, has held that the *Feres* doctrine fully applies to members of the military reserves. *Wake v. United States*, 89 F.3d 53, 58-59 (2d Cir. 1996); *see also Quintana v. United States*, 997 F.2d 711, 712 (10th Cir. 1993); *Duffy v. United States*, 966 F.2d 307, 312 (7th Cir. 1992); *Estate of Martinelli v. United States Dep't of the Army*, 812 F.2d 872, 873 (3d Cir. 1987). To the

extent that the injuries asserted in the plaintiffs' Complaint arise out of their military service, or are in the course of activity incident to their military service, therefore, the Court is without jurisdiction to hear those claims.

The Court of Appeals has identified a number of factors for courts to consider in determining whether an injury is "incident to service," including (1) "the individual's status as a member of the military at the time of the incident giving rise to the claim," (2) "the relationship of the activity to the individual's membership in the service, as well as the location of the conduct giving rise to the underlying tort claim," and (3) "whether the activity is limited to military personnel and whether the service member was taking advantage of a privilege or enjoying a benefit conferred as a result of military service." *Wake*, 89 F.3d at 58. No single factor is dispositive. *Id.*

The Court of Appeals has noted that there are three underlying rationales for the *Feres* doctrine: "(1) the distinctly federal relationship between the Government and members of its armed forces; (2) the existence of a uniform system of generous statutory disability and death benefits for members of the military; and (3) the need to preserve the military disciplinary structure and prevent judicial involvement in sensitive military matters." *Id.* at 57 (internal quotation marks omitted). These considerations should permeate the process of determining whether a service member's claim occurred within the purview of a distinctly military

sphere of activity or while a military relationship was in effect. *Id.* at 57–58.

Each of the plaintiffs' claims will be addressed in turn with respect to these factors.

A.

Application of the *Wake* factors to the first claim, the claim by the soldier-plaintiffs for negligent exposure to DU, compels the conclusion that the injuries alleged were incident to those plaintiffs' military service and are thus barred by the *Feres* doctrine. The Complaint alleges that all of the soldier-plaintiffs were performing active military duty in Iraq at the time of their exposure to DU. (Compl. ¶¶ 18-41.) Their active duty status, and the fact that they were exposed to DU while on active military duty in a foreign nation where United States troops were, and are, engaged in military operations, establish that their injuries were incident to their military service.

Although the plaintiffs allege, in their Complaint and in their brief in opposition to this motion, that the soldier-plaintiffs were engaged in "[b]asic human functions such as breathing and eating [that] are necessary to sustain human life by all human beings throughout the world" (Compl. ¶ 43), it is clear that the inquiry under the *Feres* doctrine is not whether the injuries complained of could only arise incident to military service, but rather whether they did in fact arise incident to military service.

Indeed, the Court of Appeals found the doctrine applicable in *Wake*, where a member of the Navy ROTC, who was also an inactive member of the Navy Reserves, was injured in a motor vehicle accident. *Wake*, 89 F.3d at 55-56, 62. Unlike the soldier-plaintiffs in this case, the plaintiff in *Wake* "lacked an official military status" and was on a public interstate highway in the United States at the time of her accident. *Id.* at 56, 58. Nevertheless, the Court of Appeals concluded that the injuries fell within the *Feres* bar because the plaintiff was traveling from a physical examination at a Navy facility in a Navy-owned vehicle driven by a Navy officer, and thus "was a passenger in the vehicle in her military, rather than civilian, capacity." *Id.* at 60.

Other cases have similarly applied *Feres* broadly to injuries sustained by service members incident to their military service. In *Sanchez v. United States*, 878 F.2d 633, 634, 637 (2d Cir. 1989), *Feres* was held to bar a claim against the United States for alleged negligent repair of a service member's vehicle that caused injuries to another service member in an accident on a public highway while the service members were "on liberty." In *Bozeman v. United States*, 780 F.2d 198 (2d Cir. 1985), the widow of a service member killed in an automobile accident off base filed suit against the United States alleging that the NCO club where her husband had been drinking had breached its duty to discontinue serving him drinks when it was clear he was already intoxicated. The court held that *Feres* barred the claim because the alleged negli-

gence took place at the NCO club, which the plaintiff's husband was only entitled to use as a result of his military status. *Id.* at 201.

In none of these cases did the plaintiffs allege injuries relating to actual combat, or that could only have arisen in the context of military hostilities. It is clear that the injuries alleged by the soldier-plaintiffs in this case have a much closer relationship to their active military service than did the injuries alleged in the cases cited above in which *Feres* was held to apply. The plaintiffs' allegations in their first claim for relief unavoidably implicate "civilian court scrutiny of military discipline and policies" of the very type the *Feres* doctrine is intended to avoid. *Wake*, 89 F.3d at 62. The Court therefore concludes that the first claim for relief is barred by the *Feres* doctrine.

B.

1.

The second claim for relief, for alleged medical malpractice in military facilities both overseas and in the United States prior to the soldier-plaintiffs' discharge from the military, is likewise barred by *Feres*. Numerous courts of appeals have held that claims alleging medical malpractice by military physicians in military facilities are barred by *Feres* where the plaintiff was an active member of the military at the time of the alleged malpractice. *See, e.g.*, *Jones v. United States*, 112 F.3d 299, 302 (7th Cir. 1997); *Jackson v. United States*, 110 F.3d 1484, 1489 (9th Cir. 1997); *Cutshall v. United States*, 75

F.3d 426, 428 (8th Cir. 1996); *Hayes v. United States*, 44 F.3d 377, 378-79 (5th Cir. 1995); *Quintana*, 997 F.2d at 712; *Persons v. United States*, 925 F.2d 292, 295-96 (9th Cir. 1991). Indeed, each of the two companion cases decided with *Feres* itself involved allegations of medical malpractice, and the Supreme Court noted that the common bond between the three was that "each claimant, while on active duty and not on furlough, sustained injury due to negligence of others in the armed forces." *Feres*, 340 U.S. at 138. It is therefore clear that the *Feres* doctrine precludes claims under the FTCA for medical malpractice committed while the soldier-plaintiffs were still active members of the armed forces.

2.

The third claim for relief, alleging medical malpractice after the soldier-plaintiffs were discharged from military service, presents a somewhat different situation. In *United States v. Brown*, 348 U.S. 110 (1954), the Supreme Court held that *Feres* did not bar a claim brought by a former soldier for medical malpractice alleged to have occurred after his discharge. In *Brown*, the plaintiff had been injured while on active duty and honorably discharged from the military in 1944 as a result of the injury. Doctors at the Veterans Administration had operated on his knee in 1950, and then again in 1951 because the first operation had not been entirely successful. During the second operation, the physicians allegedly used a defective tourni-

quet, resulting in serious permanent injury to the plaintiff. *Brown*, 348 U.S. at 110-11. The Supreme Court noted that *Feres* did not overrule *Brooks v. United States*, but rather created a dichotomy under which FTCA claims could not be brought for injuries arising out of or in the course of activity incident to military service, but could be brought for injuries that did not so arise. *Id.* at 112. The Court held that the injury in *Brown* was governed by *Brooks* rather than by *Feres*, reasoning that the injury alleged was medical malpractice taking place after the plaintiff's discharge from the military, which was not incurred while the plaintiff was on active duty or subject to military discipline. *Id.* at 112. The facts that the original injury occurred while the plaintiff was in the service and that he was able to receive treatment in a Veterans Administration Hospital because of his prior service were insufficient to bring the case within the bar of *Feres*. *Id.*

As the Supreme Court did in *Brown*, the Court of Appeals for the Second Circuit has more recently reaffirmed that the distinction between claims governed by *Brooks* and those governed by *Feres* retains its force. *Taber v. Maine*, 67 F.3d 1029, 1039-40 (2d Cir. 1995).

The claim of medical malpractice includes two parts. First, the plaintiffs allege that the defendants failed to inform each plaintiff of the true nature and consequences of exposure to DU and failed to inform each plaintiff about and concealed from each plaintiff the true nature of his condition, symptoms, and injuries. (Compl. ¶¶ 97–99.) Sec-

ond, the plaintiffs allege that during medical treatment the defendants failed to diagnose properly the plaintiffs' conditions, failed to render appropriate medical treatment, and negligently departed from accepted medical practices in the care and treatment of each plaintiff. (Compl. ¶¶ 100–102.)

A number of courts have held with respect to similar claims that the "duty to warn 'arises only at the time when the Government first knew or should have known of the hazardous condition, and any breach of that duty begins and ends at that time.'" *Maddick v. United States*, 978 F.2d 614, 616 (10th Cir. 1992) (quoting *Heilman v. United States*, 731 F.2d 1104, 1107 (3d Cir. 1984)); *see also Lombard v. United States*, 690 F.2d 215, 220-23 (D.C. Cir. 1982); *Henning v. United States*, 446 F.2d 774, 777–78 (3d Cir. 1971). These courts have thus concluded that the failure to warn is a continuing tort and where it begins prior to discharge it is barred by *Feres* because *Brown* applies only to alleged injuries that occur entirely post-discharge. *Maddick*, 978 F.2d at 616.

The cases upon which the plaintiffs rely are not to the contrary. Both *Broudy v. United States*, 661 F.2d 125 (9th Cir. 1981), and *Thornwell v. United States*, 471 F. Supp. 344 (D.D.C. 1979), which found an actionable independent tort for malpractice allegedly committed after discharge, followed this rule. In *Broudy*, the Court of Appeals for the Ninth Circuit reversed the district court's dismissal of an FTCA claim based upon an alleged failure to warn but based its decision on the fact that the complaint was unclear as to whether the

post-discharge negligence alleged was an independent tort or a continuing tort. *Broudy*, 661 F.2d at 128-29. The court noted:

> [I]f the Appellant can allege and prove *an independent, post-service negligent act on the part of the Government*, her claim would be cognizable under the FTCA. The Government's failure to warn Major Broudy of and monitor any possible injuries arising from his exposure to radiation might constitute such an act *if the Government learned of the danger after Major Broudy left the service.*[1]

Id. (emphasis added).

Likewise, *Thornwell* noted that the plaintiff had alleged two entirely separate torts, an intentional tort prior to discharge and negligence after discharge, and that the negligence claim could proceed because the tort was alleged to have occurred entirely after discharge. *Thornwell*, 471 F. Supp. at 351; *accord Everett v. United States*, 492 F. Supp. 318, 325-26 & n.6 (D. Ohio 1980) (allowing an FTCA claim for a separate tort alleged to have taken place wholly after discharge). The *Thornwell* court specifically noted that "it is clear, at the very least, that a mere act of negligence which takes place while the plaintiff is on active duty and which then remains

---

[1] In *Monaco v. United States*, 661 F.2d 129 (9th Cir. 1981), decided the same day as *Broudy*, the Court of Appeals for the Ninth Circuit squarely held that *Brown* could not be "extended to include post-service injury resulting from in-service negligence." *Id.* at 133.

uncorrected after discharge, is not grounds for suit." *Thornwell*, 471 F. Supp. at 351.

The Complaint in this case plainly alleges the same continuing concealment and failures to warn both pre- and post-discharge. (*See* Compl. ¶¶ 90-92, 97-99.) The Complaint also alleges that the Government was aware, or should have been aware, of the risks posed by DU and its likely presence where the soldier-plaintiffs would be stationed, prior to the soldier-plaintiffs' arrival in Iraq and thus prior to their discharge. (*See* Compl. ¶¶ 44-45, 53-67.) Those allegations are therefore barred by *Feres*. *See Maddick*, 978 F.2d at 616.

The Complaint also alleges, however, that military doctors "failed to render appropriate medical treatment" for the plaintiffs' conditions, and "negligently departed from accepted medical practices" in caring for them. (Compl. ¶¶ 101-102.) Unlike the duty to warn, which is breached at the time the defendant knew or should have known of the risk and failed to warn the plaintiffs of that risk, this alleged medical malpractice is not a continuing tort but rather a series of separate acts or omissions taking place wholly after the soldier-plaintiffs' respective discharges from service. Such alleged malpractice is, under the Supreme Court's decision in *Brown*, "not incident to the military service," and it presents a cognizable claim under the FTCA. *Brown*, 348 U.S. at 113. The Court will therefore dismiss the third claim for relief except to the extent that it alleges failure to treat and failure to adhere to accepted medical practices

after the soldier-plaintiffs were discharged from military service.[2]

C.

The fourth, fifth, and sixth claims for relief, asserted by Victoria Matthew and by the spouses of the soldier-plaintiffs, are barred by the *Feres* doctrine to the extent that they are based on injuries for which the soldier-plaintiffs could not recover under *Feres*. The Supreme Court noted in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), that

> where the case concerns an injury sustained by a soldier while on duty, the effect of the action upon military discipline is identical whether the suit is brought by the soldier directly or by a third party. The litigation would take virtually the identical form in either case, and at issue would be the degree of fault, if any, on the part of the Government's agents and the effect upon the serviceman's safety. The trial would, in either case, involve second-guessing military orders, and would often require members of the Armed

[2] Similarly, the plaintiffs' allegation that the defendants negligently failed to diagnose properly the symptoms and injuries caused by each plaintiff's exposure to DU cannot be dismissed at this stage of the case. The failure to diagnose is directly related to the alleged failure to render appropriate medical treatment and the negligent departure from accepted medical practices that occurred after discharge. (Compl. ¶¶ 100–102.)

> Services to testify in court as to each other's decisions and actions.

Stencel, 431 U.S. at 673. The Court therefore held a third-party indemnity action "unavailable for essentially the same reasons that the direct action by [the soldier] is barred by *Feres*." *Id.*

Numerous courts have applied *Feres* and *Stencel* to preclude suits by third parties for injuries that have their genesis in injuries incurred by service members incident to their service.[3] The Court of Appeals for the Second Circuit held in *In re Agent Orange Product Liability Litigation*, 818 F.2d 201 (2d Cir. 1987), that *Feres* bars "a suit for damages occasioned by activities that are not meaningfully separable from a protected discretionary function" of the military. *Id.* at 204 (quoting *Gray v. Bell*, 712 F.2d 490, 516 (D.C. Cir. 1983)). The relevant inquiry is not, therefore, who is injured and when the injury becomes manifest, but rather the time and nature of the negligent act alleged. *Monaco v. United States*, 661 F.2d 129, 133 (9th Cir. 1981); *see also Agent Orange*, 818 F.2d at 202 (noting that, where the decision challenged is "military, political and discretionary, it is imperative that a court look primarily to the cause of injury rather than to the character of a claimant" (internal quotation marks omitted)).

---

[3] This rule applies regardless of whether, as a matter of state law, the claim is considered "derivative" of a claim that could be brought by the soldier personally or independent of such a claim. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 201, 202-03 (2d Cir. 1987).

1.

It is clear that the fourth claim, in which Victoria Claudette Matthew alleges that she has suffered injuries as a result of exposure to DU "on conception and thereafter," has its genesis in the alleged injury to her father, Gerard Darren Matthew. (Compl. ¶¶ 103–07.) A similar case was presented in *Monaco v. United States*, in which the Court of Appeals for the Ninth Circuit held that a claim by the child of a soldier who had been exposed to radiation during his military service was barred by *Feres*. *Monaco*, 661 F.2d at 133. The complaint in *Monaco* alleged that the child's birth defect had been caused by her father's exposure to radiation. *Id.* The court reasoned that, while the complaint alleged a separate injury to the soldier's child, and that injury manifested itself after her father's discharge, this injury was alleged to have been caused by the military's negligence while her father was on active duty and thus implicated the type of inquiry into military decisionmaking precluded by *Stencel*.[4] *Id.* at 133-34; *see also Minns v. United States*, 155 F.3d 445, 450 (4th Cir. 1998) (affirming dismissal of claims by soldiers' children for birth defects because the "servicemen's exposure to the chemicals is the genesis of the plaintiffs'

[4] Indeed, the soldier's own claim in *Monaco* was also held barred by *Feres* for the same reason: Although he did not become aware of his cancer until 1971, well after his discharge, the relevant tortious activity was alleged to have taken place between 1943 and 1946, during his military service. *Monaco*, 661 F.2d at 130, 132-33.

alleged contact with the chemicals"); *Grosinksy v. United States*, 947 F.2d 417, 418 (9th Cir. 1991) (noting that *Feres* "bars suits by third parties that have their genesis in injuries to members of the armed forces"); *Mondelli v. United States*, 711 F.2d 567, 569-70 (3d Cir. 1983) (affirming dismissal under *Feres* of claims by a child alleging injuries caused by her father's exposure to radiation while in the military); *Lombard v. United States*, 690 F.2d 215, 223 (D.C. Cir. 1982) ("It is well established that *Feres* bars recovery by family members where the cause of action is ancillary or derivative to the serviceman's action for his own injury received incident to military service.").[5] The fourth claim is therefore barred by *Feres*.

---

[5] The plaintiffs provide no authority to the contrary, but rather rely on the dissent of then-Judge Ginsburg in *Lombard v. United States* and the opinion in *Mondelli v. United States*, in which the panel expressed misgivings about the result it reached. (Pls.' Mem. in Opp'n to Def.'s Mot. to Dismiss, at 20-21.) In each of those cases, however, the court held that the claim was barred by *Feres*. In *Mondelli*, for example, the Court of Appeals concluded: "[T]he Supreme Court has construed the FTCA to subordinate the interests of children of service personnel to the exigencies of military discipline. Although these are delicate policy judgments, they are in the final analysis committed to Congress. Consequently, we conclude, with reluctance, that the claims of Rosemarie Mondelli are barred." *Mondelli*, 711 F.3d at 570.

A divided panel of the Court of Appeals for the Sixth Circuit recently held that the husband and child of a mother who had allegedly been provided with negligent pre-natal care while she was in the Navy could sue for injuries to the child. *Brown v. United States*, No. 04-5171, 2006 WL 2571119 (6th Cir. Sept. 8, 2006). In that case, however, the court noted that the allegedly inadequate treatment produced no injury what

2.

The fifth claim for relief alleges that Janise Matthew has suffered injuries as a result of her daughter's exposure to DU. (Compl. ¶¶ 108-11.) This claim, like Victoria Matthew's claim for relief, has its genesis in Gerald Matthew's alleged exposure to DU while on active military duty and is therefore barred for the same reasons.

3.

The sixth claim for relief alleges that the spouses of the soldier-plaintiffs lost their "services, society, and companionship" as a result of the defendants' negligence. (Compl. ¶¶ 112-26.) To the extent that the spouses' claims are based on the claims of the soldier-plaintiffs that are barred by *Feres*, the claims of the spouses are also barred because the claims of the spouses have their genesis in the soldiers' alleged exposure to DU while serving in the military in Iraq. In *Agent Orange*, the Court of Appeals cited with approval the decision in *Harrison v. United States*, 479 F. Supp. 529, 535 (D. Conn. 1979), *aff'd*, 622 F.2d 573 (2d Cir. 1980), which held that under the FTCA a soldier's

---

ever to the service member and harmed only the child. The Court of Appeals held that the Federal Tort Claims Act did not bar recovery for negligent prenatal injuries to the child of a military service person that are independent of any injury to the child's parent. In this case, however, the injuries to the child are dependent on the alleged injuries to the service member because they depend on the exposure of the service member to DU.

spouse could not recover for an injury, based on "the same set of facts," for which the soldier could not personally recover. *Agent Orange*, 818 F.2d at 203. A number of other courts have explicitly held that suits for loss of consortium are barred by the *Feres* doctrine. *See, e.g., Schoemer v. United States*, 59 F.3d 26, 28, 30 & n.5 (5th Cir. 1995) (affirming dismissal of claims for loss of "income, support, and consortium" by a injured service member's wife); *Persons*, 925 F.2d at 297 (affirming dismissal of a loss of consortium claim under *Feres* and noting the near-unanimous view among the circuits that "derivative" claims are barred by *Feres*); *Kendrick v. United States*, 877 F.2d 1201, 1206-07 (4th Cir. 1989) (holding that claims such as loss of consortium that are "derivative" of the service member's own claims are barred by *Feres*). In view of this overwhelming precedent and the position taken by the Court of Appeals for the Second Circuit in *Agent Orange*, the Court is bound to conclude that the sixth claim for relief is precluded by the *Feres* doctrine to the extent that the spouses attempt to recover for damages that are based on the claims of the soldier-plaintiffs that are barred by *Feres*. Hence, the sole claim of the spouses that survives is their claim for damages as a result of injuries to the soldier-plaintiffs from so much of the medical malpractice claim alleged in the third claim that has not been dismissed under *Feres*.

III.

The Government also argues that the specific statutory exclusions in 28 U.S.C. §§ 2680(j) and 2680(k) bar the plaintiffs' claims.

A.

Section 2680(j) excludes from the Government's waiver of sovereign immunity "[a]ny claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Both parties' briefs cite the decision of the Court of Appeals for the Ninth Circuit in *Johnson v. United States* for the proposition that Section 2680(j) bars suit for injuries from physical violence relating to actual hostilities or "activities both necessary to and in direct connection with actual hostilities." *Johnson v. United States*, 170 F.2d 767, 770 (9th Cir. 1948). The Government argues that the claims all arise from the soldier-plaintiffs' combatant activities during the Iraq war, and that Section 2680(j) applies even where there is no formal declaration of war. (Def.'s Mem. in Supp. of Mot. to Dismiss, at 19-20.) The plaintiffs counter that their injuries were not incident to "combatant activities," which they assert had ceased in Iraq prior to their injuries. (Pls.' Mem. in Opp'n to Def.'s Mot. to Dismiss, at 8-13.)

The statutory exemption in 28 U.S.C. § 2680(j) applies to a much narrower set of circumstances than the *Feres* doctrine, which rests upon a conclusion that the waiver of sovereign immunity in 28

U.S.C. § 1346 was not intended to apply to claims by service members for injuries incident to their service. Because the Court concludes that most of the plaintiffs' claims are precluded by the *Feres* doctrine, the Court need not resolve whether any of the claims so precluded are independently barred by 28 U.S.C. § 2680(j). The claims that are not precluded under *Feres*, namely those for alleged failure properly to treat and to follow accepted medical practices with respect to the soldier-plaintiffs' treatment after their discharge, do not arise out of actual hostilities or activities necessary to such hostilities, but rather arise out of medical treatment provided at army facilities after the soldier-plaintiffs were discharged. Those claims are therefore not barred by 28 U.S.C. § 2680(j).

B.

Section 2680(k) excludes from the Government's waiver of sovereign immunity "[a]ny claim arising in a foreign country." 28 U S.C. § 2680(k). The Government argues that, with the exception of claims relating to medical treatment provided at military facilities in the United States, the plaintiffs' claims are precluded by this provision. As with the Government's argument under 28 U.S.C. § 2680(j), the Court need not reach whether those claims barred by *Feres* are also barred under 28 U.S.C. § 2680(k).

At the argument on the current motion, the counsel for the plaintiffs made it clear that the medical malpractice alleged in the third claim which relates to post-discharge malpractice is alleged to

have occurred in the United States. (*See also* Pls.' Mem. at 10 ("[A]ll post-discharge malpractice claims are alleged to have occurred in the United States.").) As the Government concedes, 28 U.S.C. § 2680(k) is not a bar to a claim for negligent medical treatment that took place in the United States.[6]

IV.

The Government also moves, in the alternative, to dismiss the plaintiffs' medical malpractice claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted. On such a motion, the allegations in the complaint are accepted as true. *See Grandon v. Merrill Lynch & Co.*, 147 F.3d 184, 188 (2d Cir. 1998). In deciding a motion to dismiss for failure to state a claim, all reasonable inferences must be drawn in the plaintiff's favor. *See Gant v. Wallingford Bd. of Educ.*, 69 F.3d 669, 673 (2d Cir. 1995); *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989). The Court's function on a motion to dismiss is "not to weigh the evidence that might be presented at trial but merely to determine whether the complaint itself is legally sufficient." *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985). Therefore, the defendants' motion should only be granted if it appears that the plaintiffs can prove no set of facts in support of their claims that would entitle them to relief. *See Swierkiewicz v.*

[6] Any medical malpractice that allegedly occurred in a foreign country would be barred by 28 U.S.C. § 2680(k).

Sorema, N.A., 534 U.S. 506 (2002); *see also Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Grandon*, 147 F.3d at 188; *Goldman*, 754 F.2d at 1065; *Burrell v. State Farm & Cas. Co.*, 226 F. Supp. 2d 427, 434 (S.D.N.Y. 2002).

As explained above, the plaintiffs' medical malpractice claims based on a duty to warn the plaintiffs of the risks associated with DU exposure are barred by *Feres*. The Government does not dispute that failure to treat and failure to adhere to commonly accepted medical practices constitute claims upon which relief can be granted, but rather asserts that these claims must be dismissed because the Complaint fails to identify with sufficient specificity the dates on which the allegedly negligent treatment was rendered and by which doctors. (Def.'s Mem. in Supp. of Mot. to Dismiss, at 22-24.)

In *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), the Supreme Court reaffirmed that "a complaint must include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Such a statement must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Swierkiewicz*, 534 U.S. at 512 (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). While the Government contends that the Complaint fails to provide the Government with a fair understanding of the claims asserted, the Court does not agree. The plaintiffs' medical malpractice claim is not governed by Rule 9(b), which requires that allegations of fraud or mistake be pleaded with specificity. *See*

Fed. R. Civ. P. 9(b). Rather, the plaintiffs' medical malpractice claims are only subject to the general requirements of Rule 8(a). *See Long v. Adams*, 411 F. Supp. 2d 701, 706 (E.D. Mich. 2006). The Complaint alleges that, after discharge, military physicians "failed to render appropriate medical treatment" and "negligently departed from accepted medical practices in [their] care and treatment of each plaintiff." (Compl. ¶¶ 101-02.) The Complaint also identifies a non-exclusive list of the medical facilities in which the plaintiffs were treated and specifies a date range between April 2003 and the time of the Complaint. (Compl. ¶ 88.) These allegations provide the Government with sufficient notice of the claims, especially where records of the plaintiffs' treatment in the identified military facilities should be in the Government's possession. Rule 8(a) requires no more; rather, its "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Swierkiewicz*, 534 U.S. at 512. The Court also noted that, "If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding." *Id.* at 514.

Nor does the Complaint violate Rule 9(f) of the Federal Rules of Civil Procedure, which provides that "[f]or the purposes of testing the sufficiency of a pleading, averments of time and place are material and shall be considered like all other averments of material matter." Fed. R. Civ. P. 9(f).

"Rule 9(f) does not require the pleader to set out specific allegations of time and place; it merely states the significance of these allegations when they are actually interposed." *Rosen ex rel. Egghead.com v. Brookhaven Capital Mgmt. Co.*, 179 F. Supp. 2d 330, 334 (S.D.N.Y. 2002) (internal quotation marks omitted). By its plain text, Rule 9(f) permits consideration of allegations of time and place when the sufficiency of the complaint is challenged, and has thus been used primarily as a screening device permitting dismissal under Rule 12(b)(6) where the averments in the complaint make clear that the claim is time-barred, an affirmative defense that must normally be raised in an answer under Rule 8(c). *See id.*; *see also Hoover v. Langston Equip. Assocs., Inc.*, 958 F.2d 742, 744 (6th Cir. 1992). The Government does not suggest that the time frame alleged in the Complaint establishes that any statute of limitations has expired, and the Court notes that the Government may move under Rule 12(e) for a more definite statement if it is unable to frame a responsive pleading. Rule 9(f), however, does not provide a basis for dismissing the claims.

CONCLUSION

For the reasons explained above, the Government's motion to dismiss for lack of subject matter jurisdiction is **denied** with respect to the plaintiffs' claims, in their third claim for relief, that military physicians failed properly to treat them and negligently departed from accepted medical practices to

the extent that the tortious conduct alleged occurred in the United States. The motion to dismiss is also **denied** with respect to so much of the sixth claim as alleges damages to the spouses of the soldier-plaintiffs based on the injuries to the soldier-plaintiffs alleged in the residue of the third claim that has not been dismissed. The Government's motion to dismiss as to all other claims is **granted**. The Government's motion to dismiss for failure to state a claim upon which relief can be granted is **denied**.

SO ORDERED.

Dated: New York, New York
September 26, 2006

/s/ **John G. Koeltl**
John G. Koeltl
United States District Judge